



ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

March 8, 2016

Velveta Golightly-Howell, Director
Jeryl Covington, Acting Assistant Director
Office of Civil Rights
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1201-A
Washington, DC 20460

**Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction –
Alabama Department of Environmental Management Permitting of
Arrowhead Landfill in Perry County, AL (EPA OCR File No. 01R-12-R4)**

Dear Dir. Golightly-Howell and Acting Asst. Dir. Covington,

We submit this letter in support of the above-captioned complaint. Complainants include many individuals who have experienced the harmful impacts of the Arrowhead Landfill (“Landfill”) for years, including the numerous harms described in detail in the attached declarations and summarized below. The Landfill, plain and simple, has had a discriminatory and disproportionate impact on the primarily African American community living near it in Uniontown, Alabama. The Alabama Department of Environmental Management’s (“ADEM’s”) renewal of the permit for the Landfill failed to require even the most basic protections against harm from the Landfill, even as the Landfill is currently soliciting more coal ash for this small, rural town. Based on these facts, as described in the Complaint, supplemented by interviews with witnesses and additional documentation, and further explained below, the Office of Civil Rights (“OCR”) of the Environmental Protection Agency (“EPA”) should make a finding of discrimination against ADEM.

The following letter brief summarizes these impacts and the legal standards that apply.¹

¹ It is EPA’s responsibility to conduct the investigation, not Complainants or their counsel. While Complainants and their counsel have submitted voluminous records of the impacts of the Landfill, the burden ultimately rests with EPA to conduct a thorough investigation. *See also* Letter from Marianne Engelman Lado, Sr. Staff Atty. & Matthew Baca, Associate Atty., Earthjustice, to Velveta Golightly-Howell, Dir. & Jeryl Covington, Acting Asst. Dir., EPA OCR (March 4, 2016).

INTRODUCTION

Many of the Complainants in this investigation have endured numerous and disproportionate impacts based on race as a result of the Landfill. They also have witnessed—and many times documented—the impacts to other residents of Uniontown, a predominantly African American community. The impacts are wide and varied, differing on an individual basis but showing a strong and similar trend across the community: noxious odor, headaches and other problems because of air emissions, respiratory illness, diminished quality of life, risks to drinking water, and decreased property values. Complainants raised concerns about these impacts before ADEM reissued the permits on September 27, 2011 and February 3, 2012, and ADEM was aware or should have been aware of the risks associated with the Landfill to Uniontown and its residents. Adverse impacts have continued to be experienced since the reissuance of the permits in 2011 and 2012, and there is no reason to believe they will not continue into the future, especially in light of the Landfill’s public solicitation of additional coal ash. These impacts have a disparate impact on the basis of race and result from ADEM’s failure to ensure that its permits for the Landfill would avoid disparate impacts to African American people in the area. That is impermissible under EPA’s Title VI regulations, and for that reason, EPA must make a finding of discrimination in this case.

LIST OF COMPLAINANTS

Additional Complainants have been added to this complaint since it was initially filed. Complainants request that identifying information be kept confidential, given concerns about intimidation and retaliation, but include an updated list of Complainants as Exhibit 1.²

ARGUMENT

I. ADEM FAILED TO EVALUATE WHETHER ITS DECISION TO PERMIT THE LANDFILL WOULD HAVE A DISPARATE IMPACT ON THE BASIS OF RACE.

Disparate impact discrimination under Title VI’s regulations occurs when “a facially neutral policy is causally related to an adverse disparate impact [based on] race, color, or national origin.” *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446, 484 (D.N.J.), *modified*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev’d sub nom. on other grounds*, 274 F.3d 771 (3d Cir. 2001); *see also The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009). A violation of Title VI and its regulations is established when, as here, a recipient fails to consider the disparate impact of a facility’s operation on the basis of race, color or national origin as part of a decision to permit. *S. Camden Citizens in Action*, 145 F. Supp. 2d at 481 (granting plaintiff’s request for declaratory judgment on this basis); *see also* Letter from Peter M. Rogoff, Adm’r, Fed. Transit Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm’n, & Dorothy Dugger, Gen Manager, S.F. Bay Area Rapid Transit Dist. (Jan. 15, 2010), *available at* <https://oaklandliving.files.wordpress.com/>

² Exhibits to this letter are available for download here: <https://earthjustice.sharefile.com/d-s5b59a9f4ea44768b>.

2010 /01/fta-letter-to-mtc-and-bart-on-oakland-airport-connector.pdf (preliminary results of compliance review revealed failure to conduct equity analysis, putting agency in danger of losing federal funds). A finding of discrimination should be made when, as here, a recipient agency fails to take steps to ensure there was no disparate impact from its plans. Indeed, in this case, ADEM has refused even to evaluate whether permits have an unjustified disparate impact on the basis of race.

ADEM has wholly failed to conduct disparate impact evaluations and analysis. In 2003, OCR cautioned ADEM that its “failure to *adequately* consider socio-economic impacts (including race) at any point in the siting and permitting process for municipal solid waste landfills in Alabama” created a “significant potential” for failing to comply with Title VI. Letter from Karen D. Higginbotham, Dir., EPA OCR, to Luke Cole, Ctr. on Race, Poverty & the Env’t, and Cal. Rural Legal Assistance Found., & James W. Warr, Dir, ADEM, at 7 (July 1, 2003) (filed in EPA File No. 28R-99-R4). OCR stated, “[t]his potential failure of consideration could lead, in the future, to ADEM-permitted landfills that have an adverse disparate impact on a population protected by EPA’s Part 7 regulations.” *Id.* Over time, complainants and representatives of other disproportionately affected communities in Alabama have appealed to ADEM to put systems, policies and practices in place to collect demographic data, evaluate exposures, and analyze disproportionate impacts on the basis of race, color and national origin but ADEM has refused. *See, e.g.*, ADEM Reform Coal., Environmental Justice for All Alabama Citizens (Apr. 11, 2014) (presented to Ala. Env’tl. Mgmt. Comm’n) (April 11, 2014), attached hereto as Exhibit 2.³ Indeed, on August 20, 2015, Attorney David A. Ludder submitted a public disclosure request seeking “any written Title VI compliance program(s) that ADEM has and/or is implementing to ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral.” E-mail from David A. Ludder, to ADEM Records (July 24, 2013), attached hereto as Exhibit 3. ADEM’s failure to analyze whether permits have a disproportionate impact is demonstrated by its response to the request:

It is the Department’s practice to comply with all Federal and State statutes, including Title VI. *There are no documents that conform to those requested in your Public Records Request.*

E-mail from Shawn S. Sibley, Office of Gen. Counsel, ADEM, to David A. Ludder (Aug. 15, 2013) (emphasis added), attached hereto as Exhibit 3 at 2. In addition, where ADEM has been confronted with results and evidence showing adverse effects from the Landfill, those requests for investigation have gone unanswered or have not triggered action resulting in mitigation or

³ Complainant, Ex. 6 Personal Privacy (PP) is one of a number of resources available to provide OCR with information on ADEM’s refusal to evaluate its compliance with Title VI and the disproportionate impacts of permits granted in 2011 and 2012 to Arrowhead Landfill and other waste disposal sites. Ex. 6 Personal Privacy (PP) chaired the ADEM Reform Coalition for approximately four years. Attorney David Ludder was a founder of the Coalition and is another resource. In addition, OCR’s investigation should include interviews with current and former personnel at ADEM, as well as requests for documentation from ADEM.

permit modification

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

ADEM has evidenced, at best, disregard for taking steps to ensure compliance with Title VI, and Complainants believe that ADEM fails in its duty to protect the environment where the people most affected are black. *See, e.g.*

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

II. COMPLAINANTS ARE INJURED BY ADEM'S DECISION TO PERMIT ARROWHEAD LANDFILL WITH INSUFFICIENT PROTECTION OF THE COMMUNITY'S HEALTH AND WELFARE.

Under EPA's Title VI regulations, "[n]o person shall be . . . subjected to discrimination under any program or activity receiving EPA assistance on the basis of race . . ." 40 C.F.R. § 7.30. To make that determination, EPA evaluates "whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin." Draft Title VI Guidance for EPA Assistance Recipients & Draft Revised Guidance for Investigating Title VI Administrative Complaints, 65 Fed. Reg. 39,650, 39,654, 39,669 (June 27, 2000) ("Draft Guidance"). The following section describes the significant adverse impacts caused to the community by ADEM's issuance and re-issuance of permits to the Arrowhead Landfill. Many of these impacts are ongoing, as described below and in the accompanying declarations. This information supplements the testimonies given during EPA's site visit in August 2014 and the other evidence previously submitted as part of this investigation, including the demonstration of impact in the complaint itself.

A. The Injuries and Impacts from the Landfill Are Significant and Substantial.

The harms people living near the Landfill have endured are numerous. Many of these, such as smell, diminution of quality of life, and reduced property values can easily be attributed to the Landfill. Others, such as surface water impacts have been verified as likely stemming from the Landfill by an independent scientist **Ex. 6 Personal Privacy (PP)** (who recommends further testing to confirm her preliminary results), and conform to the anecdotal evidence members of the community have described for years. For all these reasons, there can be no escaping the on-the-ground reality Complainants and other community members face every day: this Landfill harms people in and around the community.

1. Odor

The odor from the Landfill is pervasive near the Landfill. It is an acrid, sometimes putrid odor that is hard or impossible to escape **Ex. 6 Personal Privacy (PP)**. It is described as heavy, stinky, horrible, powerful, foul, like ammonia, acrid, stench of rotten eggs, and that it can take your breath away; the odor is worse some times than at others, such as after

⁴ The declarations are attached alphabetically by last name to this letter as Exhibits 11-31. An index to the exhibits and declarations is appended to this letter for ease of reference.

rain or in the morning or when it is cloudy.

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

The smell has also made residents vomit.

Ex. 6 Personal Privacy (PP)

They have also felt dizzy and sick from the smell.

Ex. 6 Personal Privacy (PP)

The smell

did not exist before the Landfill was installed.

Ex. 6 Personal Privacy (PP)

The smell caused ^{Ex. 6 Personal Privacy (PP)} to have to close down her business when people stopped patronizing it because of the smell.

Ex. 6 Personal Privacy (PP)

Indeed, many people moved to the area specifically because of their love of the outdoors. Yet now they have been chased indoors, unable to open their windows because of the chemical stench of coal ash and other waste. It bears repeating that many residents live mere feet from the Landfill, which is now rightly referred to as a “mountain” in town. ^{Ex. 6 Personal Privacy (PP)} The Landfill’s ever-present odor has greatly injured their lives.

2. *Air Emissions and Dust*

In 2012, Stone Lions Environmental Corporation, an air pollution consulting firm specializing in air pollution evaluations related to industrial facilities, conducted an air dispersion modeling study of the atmospheric emissions of a subset of pollutants from the Arrowhead Landfill to quantify the impact of hydrogen sulfide (“H₂S”) and total suspended particulate (“TSP”) matter.⁵ Jim Tarr, Stone Lions Environmental Corp., An Evaluation of Particulate Matter, Hydrogen [sic] Sulfide, and Non-Methane Organic Compounds from the Arrowhead Landfill (2012) (attached as Exhibit T3 to the Complaint). Researchers drew the following opinions based on the study:

- “During 2010, and the previous year, the Arrowhead LF [Landfill] generated a substantial amount of H₂S and TSP air emissions during normal operation.”

Id. at 5. Although the data for this study was largely, though not exclusively, based on emissions that preceded the reissuance of the Landfill’s permit in 2011 and 2012 challenged by Complainants, findings based on emissions in 2010 demonstrate risks associated with Landfill activities. As discussed below, without adequate permit conditions, ADEM’s decision to reissue the permit to the Landfill failed to provide protection against similar harms. The report also concluded:

- “Those H₂S and TSP air emissions resulted in a significant negative impact on the neighborhoods near the LF boundaries.

⁵ A copy of the resume of the author of the study, Jim Tarr, is available at http://www.stonelions.com/JT_resume.pdf.

- “The odor threshold of H₂S was exceeded during more than one-thousand hours at locations immediately adjacent to the LF during 2010; the odor threshold of H₂S was exceeded more than forty hours at every location illustrated on the base map during 2010....
- “The original primary ambient air quality standard for TSP (150 micrograms/M³) was exceeded during 2010 at places just south of the LF boundary....
- “The apparent widespread neighborhood impact of TSP air emissions from the Arrowhead LF defined by this air dispersion modeling project is further supported by analytical results of five house dust samples collected near the LF during February 2012....
- “Had the Arrowhead LF operator chosen to employ best available control technology on the haul road and at the LF coal ash disposal area, the toxic chemical impact on the nearby community would have been less detrimental to the health, well being, and property of those who lived nearby. The more obvious impacts included TSP dust problems and frequent noxious odors at many locations around the Arrowhead LF.”

Id. at 6. In addition, though the study did not model organic sulfides because of data gaps, the report cautioned that it “should not be assumed ... that organic sulfide air emissions from the LF did not have a significant negative impact on the nearby community.” *Id.* at 5. The Stone Lions study, including analysis of dust samples in 2012, demonstrates the impacts and risks associated with the reissuance of the permit for Arrowhead Landfill. For additional information about air emissions, as needed, EPA’s investigation should include follow up with Jim Tarr, the principal investigator, and the conduct of additional air sampling.

By the smell alone—an acrid, chemical smell—it is clear to anyone who has visited the Landfill that air emissions are present. At times, a fine layer of grey dust has covered cars, homes, lawns, and all areas around the Landfill. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP) The wind carried the dust, blowing it visibly through the community. **Ex. 6 Personal Privacy (PP)** Additionally, the dust blew onto the streets and train tracks when the coal ash was first moved to town, where community members have reason to believe it remains today; the tracks are very near where people live and close to a school and where children walk to school. **Ex. 6 Personal Privacy (PP)** The dust has been so thick at times that tire tracks were visible in it. **Ex. 6 Personal Privacy (PP)** Simply, the dust has been everywhere, coating everything near the Landfill. **Ex. 6 Personal Privacy (PP)**

3. *Respiratory Illness, Neuropathy, Nose Bleeds, Rashes, Eye Problems, and Other Impacts.*

Many complainants and their family members have been affected by these emissions, attributing numerous health impacts to the bad air quality that they have reason to believe results from the Landfill. These health impacts include various respiratory problems, including aggravation of asthma, wheezing, and shortness of breath. *See, e.g.,* **Ex. 6 Personal Privacy (PP)** This is in addition to kidney problems, high blood pressure, sleep apnea, skin conditions, and other

unexplained illnesses that appear to be clustered in the area around the Landfill. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) (sleep apnea); **Ex. 6 Personal Privacy (PP)** (sinus problems); (swelling); (asthma); (unexplained and persistent cough); **Ex. 6 Personal Privacy (PP)** (high blood pressure); **Ex. 6 Personal Privacy (PP)** (blood pressure, breathing problems, sinusitis, nose bleeds); **Ex. 6 Personal Privacy (PP)** (sores); (migraines, dizziness, sinus problems, sores); (anxiety); **Ex. 6 Personal Privacy (PP)** (headaches); **Ex. 6 Personal Privacy (PP)** (hoarseness, headache, runny nose); **Ex. 6 Personal Privacy (PP)** (tingling fingers, stomach cramps); (migraines, neck pain); **Ex. 6 Personal Privacy (PP)** (sleep apnea, sinus problems); **Ex. 6 Personal Privacy (PP)** (dizziness, trouble breathing, nausea, congestion, headaches); **Ex. 6 Personal Privacy (PP)** (droopy eyelids and eye infections); (skin lesions); (tiredness, ear infections, hoarseness); (leg cramps); (sinusitis, sore throat, congestion, cough); **Ex. 6 Personal Privacy (PP)** (throat constriction); (coughing spasms, watering eyes); (hoarseness, sore throats, nasal congestion); (swollen ankles, respiratory problems, urinary tract problems, knee problems, tiredness);

Ex. 6 Personal Privacy (PP) (swollen eyes); (bronchial attack); **Ex. 6 Personal Privacy (PP)** (burning eyes, headache that resolved soon after leaving the area). Other residents have experienced eye problems including runny eyes and flashing lights. **Ex. 6 Personal Privacy (PP)** Headaches are another common problem residents believe stem from the Landfill. **Ex. 6 Personal Privacy (PP)**

Other residents, such as Esther Calhoun, have experienced neuropathy since the Landfill came to town (starting in November 2013 for **Ex. 6 Personal Privacy (PP)**

23. This is a pain that feels like a fire and may be caused by exposure to lead. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) has also experienced high blood pressure and sleeping disorders.

Ex. 6 Personal Privacy (PP) Similarly, others have experienced tingling fingers and numbness. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP)

One of the hardest things for many residents has been observing health problems suffered by their children, grandchildren, and other children they care for. Since the Landfill's arrival, children have reported headaches, runny noses, constant colds, and other respiratory problems.

Ex. 6 Personal Privacy (PP) (headaches, asthma attack); (severe stomach problems); **Ex. 6 Personal Privacy (PP)** (nosebleeds, acid reflux, sinus problems, strep throat); **Ex. 6 Personal Privacy (PP)** (asthma attack); **Ex. 6 Personal Privacy (PP)** (asthma). This also includes nosebleeds that do not seem to go away. **Ex. 6 Personal Privacy (PP)** Flu-like symptoms also appear to occur frequently today. **Ex. 6 Personal Privacy (PP)**

These illnesses have meant hospital visits and other changes in behavior. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) attends school in Birmingham, hours away, because the smell gives him colds, a runny nose, an upset stomach, and skin irritation—his health has improved since moving away. **Ex. 6 Personal Privacy (PP)** Others have experienced asthma, bronchitis, and congestion. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) who worked at the Landfill, was rushed to the hospital while working because he could not breathe, eat, or swallow. **Ex. 6 Personal Privacy (PP)** insurance was terminated at that time by his employer, and he was told he had to return to work or would be fired. **Ex. 6 Personal Privacy (PP)**

Notably, these health impacts are new—each of the declarations cited describes how these impacts post-date the arrival of the Landfill and the coal ash in town. *See, e.g.* [Ex. 6 Personal Privacy (PP)]

[Ex. 6 Personal Privacy (PP)] Significantly, also, many of these health impacts are consistent with impacts of pollution found in coal that have been documented elsewhere.⁶

4. *Drinking Water*

Well water near the Landfill does not smell clean. [Ex. 6 Personal Privacy (PP)] Although residents cannot with certainty determine that the Landfill is the cause, the financial burden of water testing should not be placed on Uniontown residents but on ADEM. Certainly, there is more than a reasonable basis for concern as city water comes out brown and dirty looking.

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

and causes stomach cramps

[Ex. 6 Personal Privacy (PP)]

The water is rusty looking and tasting

The water has a bitter, awful taste.

[Ex. 6 Personal Privacy (PP)]

Many people have resorted to drinking bottled water because of concerns about their water quality since the Landfill arrived, even though this is a major expense, particularly for the many residents who are on fixed incomes. [Ex. 6 Personal Privacy (PP)]

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

Others have simply had to continue drinking their well water or city water because they cannot afford bottled water, despite an unclean smell. [Ex. 6 Personal Privacy (PP)] At times, even those who ordinarily buy bottled water have to drink the tap water. [Ex. 6 Personal Privacy (PP)] Residents, regardless of whether they buy bottled water to drink, use city or well water to cook and bathe. [Ex. 6 Personal Privacy (PP)] Bathing in the water causes itchiness. [Ex. 6 Personal Privacy (PP)] Adverse impacts thus include risks of injury to health, the cost of bottled water, and anxiety related to the quality of water, among other things.

5. *Surface Water, and Ground Water*

Independent scientist [Ex. 6 Personal Privacy (PP)] has collected preliminary samples of surface water near the Landfill. As described in Complainants' March 4, 2016 letter to Velveta Golightly-Howell and Jeryl Covington and as described in greater detail in her declaration, attached to this letter as Exhibit 14, she found high levels of heavy metals, conductivity, arsenic, and other signifiers of coal ash. These are serious red flags that she believes indicate that ADEM or EPA must conduct further testing, as her equipment and methods only allowed for a preliminary scan of the area.

⁶ *See generally* Alan H. Lockwood, Physicians for Social Responsibility & Lisa Evans, Earthjustice, *Ash in Lungs: How Breathing Coal Ash Is Hazardous To Your Health* (2014), available at <http://www.psr.org/assets/pdfs/ash-in-the-lungs.pdf>, attached hereto as Exhibit 10.

In February 2013, [Ex. 6 Personal Privacy (PP)] first found “measurable differences in arsenic in the water adjacent to the Landfill compared to the control site.” [Ex. 6 Personal Privacy (PP)] She was “very surprised by these results.” [Ex. 6 Personal Privacy (PP)] retested them to confirm the result, and then sent an immediate email to ADEM. *Id.* [Ex. 6 Personal Privacy (PP)] believed it was her duty as a scientist to report these preliminary findings so that ADEM could investigate them further. She reported these results in the chart attached to Complainants’ March 4th Letter at Exhibit 7.

In the summer of 2013, [Ex. 6 Personal Privacy (PP)] returned to the waters around the Landfill and found almost no invertebrates of the kind one would expect in the ecologically-rich Alabama water. [Ex. 6 Personal Privacy (PP)] She also collected water samples near the Landfill and from a tributary that runs through a resident’s property where fugitive Landfill discharge was happening. [Ex. 6 Personal Privacy (PP)] She collected water coming from a pipe from the Landfill in Chilatchee Creek, and in a small tributary that runs into Chilatchee Creek. [Ex. 6 Personal Privacy (PP)] She noticed that “soil and leaves around the water from the Landfill, in the culvert, and in the tributary that runs through [Ex. 6 Personal Privacy (PP)] land were covered in a fine white powder,” which was not visible in other sites in Perry County. *Id.* Her data showed “statistically significant differences between the control and testing sites near the land fill and on [Ex. 6 Personal Privacy (PP)] property for arsenic, total dissolved solids, and conductivity.” [Ex. 6 Personal Privacy (PP)] The data for these results are attached as Exhibit 4.

[Ex. 6 Personal Privacy (PP)] returned on February 23, 2015 and collected water samples near the Landfill and the same control streams. [Ex. 6 Personal Privacy (PP)] These samples showed large variations in conductivity, which indicates a change in the ionic composition of the water. *Id.* She also found “differences between the control site [Ex. 6 Personal Privacy (PP)] property, and where water pools as it exits the Landfill in calcium, cadmium, cesium, iron, magnesium, manganese, rhenium, rubidium, selenium, sodium, strontium, sulfur, and tin.” [Ex. 6 Personal Privacy (PP)] The most dramatic differences she found were in iron and strontium. *Id.*

In December 2015 and January 2016, [Ex. 6 Personal Privacy (PP)] returned to the Landfill area to collect more samples, and in December she experienced intimidation by the general manager of the Landfill. [Ex. 6 Personal Privacy (PP)]

[Ex. 6 Personal Privacy (PP)] would advise a number of steps based on her findings. First, she advocates testing the water around the Landfill “for the full panoply of metals and critical pollutants associated with coal ash using the most sensitive tests.” [Ex. 6 Personal Privacy (PP)] This should include surface dirt and dust and the chalky white residue around the Landfill. *Id.* Plants in the area should be tested to see what they have sequestered since they act as biomonitors. *Id.* Lastly, the wells used for drinking water should be tested. *Id.*

The bottom line is that [Ex. 6 Personal Privacy (PP)] “found preliminary evidence [of] heavy metal pollutants associated with coal ash, including iron and strontium, in the water coming off the front of the Landfill, in addition to the initial indication of elevated arsenic.” [Ex. 6 Personal Privacy (PP)] Heavy metals are bioactive and are dangerous or toxic when elevated; they are of broad human health concern and may cause demonstrable problems. *Id.* ADEM has been aware that elevated levels of conductivity, arsenic, iron, strontium, calcium, cadmium, cesium, iron, magnesium, manganese, rhenium, rubidium, selenium, sodium, strontium, sulfur, and tin in runoff from the Landfill. [Ex. 6 Personal Privacy (PP)]

Ex. 6 Personal Privacy (PP) preliminary findings are in addition to earlier findings—also relayed to ADEM—that showed elevated concentration of heavy metals, arsenic, barium, chromium, lead, nickel, zinc, organic nitrogen and phosphate, magnesium, sulfate, sulfite, sulfate and chloride, above the reporting concentration. *See also* Letter from C.W. Matthews, Manager, Ala. Utility Services, LLC, to Kimberly Minton, Water Division – ADEM at 4-9 (Jan. 11, 2010) (attached with attachments to Complainants’ March 4, 2016 Letter as Exhibit 9). The high levels of Biological (BOD) and Chemical (COD) oxygen demand indicate abundant organic material in the sample, and primary pollutants (volatile, semi-volatile, and chlorinated pesticides) are specified as detectable. *Id.* Yet ADEM has taken no known action to address or evaluate these preliminary findings.

This is consistent with findings by other scientists about the chemical composition of the coal ash from the TVA coal ash spill, which found calcium, magnesium, aluminum, strontium, arsenic, barium, nickel, lithium, vanadium, copper, and chromium. *See* Laura Ruhl et al., *Survey of the Potential Environmental and Health Impacts in the Immediate Aftermath of the Coal Ash Spill in Kingston, Tennessee*, 43 Environ. Sci. Technol. 6326, 6326 (2009).

Like Ex. 6 Personal Privacy (PP) other visitors to the Landfill have noticed water draining from the Landfill in proximity to the mountain of coal ash on the site that appear to be unpermitted. Ex. 6 Personal Privacy (PP) (first-hand experience from working at Landfill); Ex. 6 Personal Privacy (PP)

6. Increased Risk of Health Impacts

Residents who live near the Landfill expect these problems will continue in the absence of mitigation measures. Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP) Residents cannot know for certain whether the health problems they are experiencing are due to the coal ash deposited at the site, the disposal of other waste, or the cumulative impacts of the Landfill and other sources of contamination in Uniontown, such as the cheese plant and problems plaguing the sewage system. They attest, however, to the contributions of the Landfill to the higher incidence of respiratory and other illnesses, and some of these conditions are associated with health hazards related to coal ash, discussed below. At the same time, the Landfill is actively soliciting more coal ash for the Arrowhead Landfill. *See* Press Release, Green Group Holdings, Arrowhead Landfill Provides Safe Haven for Utilities Disposing of Coal Ash (May 5, 2015) (attached with attachments to Complainants’ March 4, 2016 Letter as Exhibit 3), *available at* <http://www.power-eng.com/marketwired/2015/05/5/arrowhead-landfillprovides-safe-haven-for-utilities-disposing-of-coal-ash.html>. Residents believe bringing additional coal ash to the Landfill would only make these impacts worse and increase the likelihood of exposures. *See, e.g.* Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP) Additionally, coal ash is a known significant health hazard that is a carcinogen, contributes to respiratory and cardiac disease, and other health risks. *See infra* Argument Part II.B. Residents who have been exposed to the coal ash from the Landfill will live under these threats their entire lives.

7. *Diminution of Quality of Life*

The Landfill has diminished the lives of nearby residents in many ways. The one that often comes to mind for residents first is the pervasive stench of the Landfill. *See supra* Argument Part II.A.1. Yet there are numerous other ways the Landfill has decreased enjoyment of life for nearby residents. For example, many residents have given up gardening and eating fruits, vegetables, and pecans from their property. Esther Calhoun First Decl. ¶ 42; Jane Doe Decl. ¶ 15; Nathaniel Gary Decl. ¶ 11; Cynthia Foster Decl. ¶ 20; Robert Lee Decl. ¶ 11; Ellis Long Decl. ¶ 18; Mary Leila Schaeffer ¶ 12; Dorothy McCampbell Decl. ¶ 11 (giving up prize winning peaches and peach cobbler family tradition); James Smith Decl. ¶ 14; Stanley White Decl. ¶ 7. Some had other gardens they have grown for pleasure, such as roses, that have since died. Jane Doe Decl. ¶ 15. This is not only an impact on a favorite hobby, it also means that many residents must either go without healthy produce or buy fruit and vegetables they could otherwise have harvested and that they can often ill afford.

Other residents have noticed that livestock have died or become ill since the coal ash arrived. Jane Doe Decl. ¶ 15; Jimmy Jones Decl. ¶ 9; George Lipscomb Decl. ¶ 9 (two cows died after drinking water they have reason to believe was adversely affected by coal ash). The animals have exhibited symptoms unlike ordinary disease. George Lipscomb Decl. ¶ 10.

Additionally, many residents used to spend Alabama evenings on their porches or otherwise spend time outside but are now often not able to because of the smell and fear about the impact from the Landfill. Esther Calhoun First Decl. ¶ 42; Cynthia Foster Decl. ¶ 9; Jimmy Jones Decl. ¶ 12; George Lipscomb Decl. ¶ 6; Dorothy McCampbell Decl. ¶ 4. Others have had to forego or limit walking and biking outside. Nathaniel Gary Decl. ¶ 8; Jimmy Jones Decl. ¶ 6. This also means that many have had to purchase air conditioners, a major expense for people with very little money. Esther Calhoun First Decl. ¶ 43. At least one resident has passed out while sitting on her porch. Esther Calhoun First Decl. ¶ 38. In sum, community members are faced with the decision of sitting inside or being outside and living with the smell and potential effects of emissions. Dorothy McCampbell Decl. ¶ 4.

This is in addition to the many people whose children or grandchildren have become ill while visiting residents' homes and are no longer allowed to play outside for fear of the impact. Esther Calhoun First Decl. ¶ 42; Nathaniel Gary Decl. ¶ 11 (children not allowed to play basketball outside); George Lipscomb Decl. ¶ 7 (asthma attack); Dorothy McCampbell Decl. ¶ 5.

Likewise, the presence of pests such as rats, buzzards, stray dogs, snakes, crows, and flies have plagued nearby residents since the Landfill arrived. Esther Calhoun First Decl. ¶ 38; Ben Eaton Decl. ¶¶ 6-7; Frederick Gary Decl. ¶¶ 18; Nathaniel Gary Decl. ¶ 5; Cynthia Foster Decl. ¶ 10; Adam Johnston Decl. ¶ 11; Mark Johnston Decl. ¶ 11; Jimmy Jones Decl. ¶ 10; Robert Lee Decl. ¶ 10; George Lipscomb Decl. ¶ 13; Ellis Long Decl. ¶ 5; Dorothy McCampbell Decl. ¶ 6; James Smith Decl. ¶ 13; John Wathen Decl. ¶ 7; Stanley White Decl. ¶¶ 4-5. Huge flocks of buzzards gather in the Landfill and then fly all over town, tracking coal ash and other waste. Ben Eaton Decl. ¶ 6. At times, the buzzards have been on residents' houses every morning, and on trees and telephone poles. *Id.*

Many people also attend church near the Landfill, and they breathe in the smell and toxics when they are en route and at church near the Landfill. **Ex. 6 Personal Privacy (PP)** **Ex. 6 Personal Privacy (PP)**. Of course, none of this happens in a vacuum—when someone gets sick from something they attribute to the Landfill they must travel hours away to Montgomery or Birmingham to get specialized medical care. **Ex. 6 Personal Privacy (PP)** This is costly and time consuming. *Id.*

8. *Impacts to Heritage and Culture*

The Landfill has also harmed the heritage and culture of community residents. For many, the land on which they live has been in their family for generations. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) Residents describe this as a tragedy, losing the ability to live and thrive in their own home and property. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) Ownership of this property has been a point of pride for many residents. **Ex. 6 Personal Privacy (PP)**

For example, **Ex. 6 Personal Privacy (PP)** owns property that his grandfather purchased and that his ancestors worked as sharecroppers. **Ex. 6 Personal Privacy (PP)** Now, because of the Landfill, the property has been transformed into an undesirable plot with a near-constant smell. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) Many others grew up nearby, and, of course, view Uniontown and the area around the Landfill as home—that home is now tragically altered for the worse. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) Others moved to Uniontown to retire, hoping to leave a plot of land to their children. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) For this community, this is home, and they should not have to move if they do not want to. **Ex. 6 Personal Privacy (PP)**

Additionally, there is a historic African American cemetery directly adjacent to the Landfill, New Hope Cemetery. **Ex. 6 Personal Privacy (PP)** Complainant **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) has a number of family members buried there, including her brother, great grandparents, and cousin. **Ex. 6 Personal Privacy (PP)**

It was Complainants' understanding that the original owners promised to improve the upkeep of the Cemetery, though ADEM's permit was not contingent on maintenance of the Cemetery and the Landfill failed to maintain Cemetery grounds—even ingress. **Ex. 6 Personal Privacy (PP)**

The Landfill instead placed one or more monitoring wells in the grounds of the Cemetery. **Ex. 6 Personal Privacy (PP)** *see also* Exhibit 5 (photograph of monitoring well on the grounds of or in proximity to New Hope Church Cemetery). The Cemetery has been disturbed, and **Ex. 6 Personal Privacy (PP)** can no longer find the graves of her family members. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) There is also the powerful and acrid odor people experience from the Landfill when visiting the cemetery. **Ex. 6 Personal Privacy (PP)** The odor is

“overpowering and brutal, a physical presence that slaps you in the face in what should be a quiet, peaceful moment remembering family members past.” *Id.* The Landfill has also recently authorized the use of a bulldozer to carve paths through the Cemetery, which may have run over graves. **Ex. 6 Personal Privacy (PP)**

This was like a knife in the heart for those who have loved ones there, those who have fought for generations for their property. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP) This is an inexcusable affront to the community and a clear adverse impact.

9. *Property Values*

While residents do not want to move from their homes, neither can many afford to leave. The property around the Landfill has decreased in value to the point that residents do not believe they would be able to sell their property. **Ex. 6 Personal Privacy (PP)** Moving requires residents essentially to give away their property. **Ex. 6 Personal Privacy (PP)** See generally Richard C. Ready, Ne. Reg'l Ctr. for Rural Dev., Pa. State Univ., Rural Development Paper No. 27, *Do Landfills Always Depress Nearby Property Values?* (2005), available at <http://aese.psu.edu/nercrd/publications/rdp/rdp27.pdf> (meta-analysis finding that all high volume landfills negatively affect property values).

B. These Injuries Are Consistent with the Effects of Coal Ash.

Coal ash is a known significant health hazard. See Ruhl et al., *supra* p. 9, at 6331. It is a carcinogen linked to increased risk of skin, lung, liver, leukemia, breast, bladder, and bone cancer. *Id.* It is also linked to respiratory disease and inflammation, increased risk of cardiac events. *Id.* Dr. Ruhl and others evaluating this very coal ash, but in Tennessee, found that “the combined radioactivity of coal ash at the TVA spill, together with other enriched trace metals such as [nickel], [lead], and [arsenic], may increase the overall health impact in exposed populations, depending on duration of exposure, and particularly for susceptible groups of the population.” *Id.*

Likewise, many nearby residents also worked at the Landfill, and their experiences—clearly linked to coal ash—are consistent with what neighbors have experienced. They describe white bubbles on their clothing, exposure to their skin, and a material that looked like grits.

Ex. 6 Personal Privacy (PP) Others had respiratory problems, coughing, and severe stomach problems that caused numerous hospital visits. **Ex. 6 Personal Privacy (PP)** The Landfill did not

provide protective clothing, meaning there was white dust in the inside of their houses. *Id.*

Ex. 6 Personal Privacy (PP) This is in direct contrast to how the very same coal ash was treated in a primarily white, affluent area in Tennessee after the initial spill. **Ex. 6 Personal Privacy (PP)**

Ex. 6 Personal Privacy (PP)

C. There Are Substantial Cumulative Impacts in the Community.

The Landfill is one of several sources of pollution in Uniontown. For example, **Ex. 6 Personal Privacy (PP)** lives near the cheese plant in Uniontown, which also causes her to worry about her own health and that of a boy she is helping raise, **Ex. 6 Personal Privacy (PP)** At times, it is difficult to know whether it is the cheese plant or the Landfill causing a given smell and interfering with church. **Ex. 6 Personal Privacy (PP)** Suffice it to say, it is a source of pollution that affects community members. **Ex. 6 Personal Privacy (PP)**

Uniontown also has two large sprayfields that are intended to spray human excrement and other waste into the open air into a field near where people live. **Ex. 6 Personal Privacy (PP)** These sprayfields have caused sewage leaks into the ground and nearby sources of water. *Id.*

Residents believe the Landfill cheese plant, and these sprayfields are contributing to health problems in Uniontown. Ex. 6 Personal Privacy (PP) The smell from the sprayfields and cheese plant caused Ex. 6 Personal Privacy (PP) and her husband to move, unfortunately to a location directly across from where the Landfill would open. Ex. 6 Personal Privacy (PP) To be clear, the existence of other sources of contamination should not be an excuse for denying the impact of the Landfill but, rather, factors that exacerbate the effects of the Landfill on human health and the welfare of the community.

Cumulatively, the various impacts in Uniontown are devastating, as demonstrated by EPA's EJSCREEN tool. That analysis shows that the area immediately surrounding the Landfill is in the 96th percentile statewide for toxic waste disposal facilities. EPA, EJSCREEN, Report on Selected Place, Standard Report at 3 (entering latitude and longitude coordinates for Arrowhead Landfill) (data accessed Mar. 3, 2016) (Exhibit 6). Note that EPA's Draft Guidance contemplates consideration of cumulative impacts in investigations of disparate impact claims. 65 Fed. Reg. at 39661 (methodology and data of evaluating cumulative impacts of multiple pollutants and determining contributors to cumulative exposures).

D. Impacts Exist Independent of Whether Facility Violates Environmental Laws.

Recipients have independent obligations pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and it is inappropriate to tie the analysis of adversity to standards of environmental degradation and harm to health pursuant to other statutes, each themselves the product of deliberation in light of independent statutory mandates. ADEM's decision to permit Arrowhead Landfill has had adverse impacts on Uniontown residents whether or not the Landfill otherwise violated environmental health standards set pursuant to the Clean Water Act, Clean Air Act, or other environmental laws. Reliance on a presumption that protection for communities is adequate if recipients are in compliance with environmental statutes is inconsistent with civil rights law and has failed to eliminate the adverse or disparate impacts to environmental justice communities that EPA's Title VI regulations seek to forbid.

In conducting its investigation, OCR must make clear that technical compliance with environmental laws and regulations is not the measure of whether programs or activities have an "adverse impact" within the meaning of civil rights law. As was the case in the facts underlying the infamous *Select Steel* decision, these standards may involve averaging emissions over large geographical areas that, if viewed in isolation, can hide disparities. *See* Letter from Ann E. Goode, Dir., EPA OCR, to Father Phil Schmitter, Co-Dir., St. Francis Prayer Ctr. et al. (Oct. 30, 1998), (Investigative Report for Title VI Administrative Complaint in EPA OCR File No. 5R-98-R5) ("Select Steel"). These standards are not the benchmark for a determination of "impact" under Title VI. Among other things, environmental standards do not fully capture harms to public health, the environment, or a population's way of life—for example, declines in property value or cultural or social impacts experienced by communities such as the impact on New Hope Church Cemetery. EPA should evaluate potential harms to health, damage to the environment, reduction in property values, and social harms (including, for example, segregatory effects), among others, and are not limited to measurable health effects. Moreover, EPA's environmental health standards change over time, for instance, precisely because they are found to be

insufficiently protective.⁷ Indeed, the Draft Guidance contains language clarifying that “[c]ompliance with environmental laws does not constitute per se compliance with Title VI.”⁸ We agree. But although the provisions in the Draft Guidance suggest that compliance with environmental laws may not be *per se* compliance with Title VI, nonetheless as a practical matter environmental regulatory standards have at times inappropriately determined Title VI compliance because of the presumption of compliance that EPA imposes if environmental standards are not exceeded.⁹ More recently, EPA has taken comments on a policy paper to repeal any rebuttable presumption. See EPA, Draft Policy Paper, Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards (drft. Jan. 24, 2013). While noncompliance with an environmental or health standard may be relevant to a finding of adverse impact in some contexts, compliance with a federal, state, or local environmental standard does not negate otherwise valid evidence of harm or disparity under civil rights law.

While the framework for assessing whether a recipient is in violation of the discriminatory effects standard in EPA’s Title VI implementing regulations include a determination of whether the impact of a recipient’s programs or activities is both “adverse” and borne disproportionately by a group of persons based on race, color, or national origin, compliance with environmental laws and standards is not the ruler for civil rights compliance. Title VI is a civil rights statute, and it is independent of environmental laws and standards. Before *Alexander v. Sandoval*, 532 U.S. 275 (2001), when cases of disparate impact were adjudicated in court, the threshold for establishing impact was low. With rare exception, the

⁷ Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474, 6480 (Feb. 9, 2010) (discussing new evidence regarding the relationship between NO₂ exposure and health effects). Along these lines, we note the decision of the Environmental Appeals Board (“EAB”) in which the EAB concluded that EPA erred when it relied solely on compliance with the then-existing annual National Ambient Air Quality Standard (“NAAQS”) for nitrogen dioxide (“NO₂”) as sufficient to find that the Alaska Native population would not experience “adverse human health or environmental effects from the permitted activity.” *In re Shell Gulf of Mex., Inc.*, 15 E.A.D. 103, 2010 WL 5478647, at *2 (EAB 2010). Though this decision arose in the context of the EJ Executive Order, and also turned on the fact that the NO₂ air quality standard was under revision, it is clear that current compliance with an environmental standard is not determinative of whether an action or policy has an adverse impact. Though EAB rulings have not uniformly required the Agency to take into account newer data regarding the sufficiency of environmental standards to protect public health when issuing permits, *see, e.g., In re Shell Offshore, Inc.*, 15 E.A.D. 536, 2012 WL 1123876, at *42-43 (EAB 2012), there is no doubt that standards in force to implement environmental laws at any given time do not and cannot capture all impact of a challenged activity.

⁸ 65 Fed. Reg. at 39,680.

⁹ *Id.* (“[W]here the area in question is attaining that [NAAQS] standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.”).

crux of the inquiry focused on whether or not the impact was felt disproportionately on the basis of race or national origin, not the magnitude of the impact itself. See Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in 10 Civil Rights Litigation and Attorney Fees Annual Handbook 173, 186 (Barbara M. Wolvovitz et al. eds.1994).

Finally, investigating adverse impacts should not be constrained by gaps in scientific knowledge about exposure, exposure pathways and health effects, or more broadly, the expertise of EPA or the recipients. Evidence of any and all adverse impacts is relevant to a finding of discrimination.

E. OCR Must Consider the Full Range of Impacts of the Whole Permit.

It is crucial that EPA evaluate the impacts of the whole permit and permitting history of the Arrowhead Landfill, not just changes from the original permit. EPA's Draft Guidance ambiguously states that EPA's analysis of a permit modification is limited only to the "modification and its effects." 65 Fed. Reg. at 39676. Here, ADEM *reissued* and modified the Landfill's permit, so EPA's analysis should look at the effect of the entire permit and this limitation should not apply. Any interpretation of EPA's Draft Revised Guidance to the contrary would be in error. If a school district, for example, were to decide each year to implement a testing or tracking program that has a disparate impact on the basis of race—for example, that has the effect of tracking children of one race to lower level classes, investigation into the impact of the testing or tracking program would not be limited to the marginal difference that the test in year two had on the basis of race versus year one. The Office of Civil Rights examines the disparate impact of the testing or tracking program, taken as a whole. In 2013, for example, the U.S. Department of Education announced a voluntary compliance agreement with the Schenectady City School District as a result of a compliance review that found that the school district over-classified African American and Latino school children as emotionally disturbed and referred them for special education. Press Release, U.S. Dep't of Educ., U.S. Education Department Announces Voluntary Resolution of Schenectady, N.Y., City School District Compliance Review (Oct. 30, 2013), *available at* <http://www.ed.gov/news/press-releases/us-education-department-announces-voluntary-resolution-schenectady-ny-city-school-district-compliance-review>. The Department of Education took note of the fact that in the school year 2012-2013, African American and Latino school children were over-classified without discounting previous over-classifications as somehow justifying continuing discriminatory policies, practices or actions. *Id.* Similarly, here, EPA must evaluate the effect of the permitting decisions in 2011 and 2012 and not limit its analysis to the effects only of any modification.

Moreover, when evaluating whether an action has a disparate impact, ADEM—and EPA—must look at the full range of impacts, including potential harms to health, damage to the environment, reduction in property values, and social harms, among others, and should not be limited to those delineated under state law as under the recipient's authority. *Cf.* Draft Guidance, 65 Fed. Reg. at 39,670. As stated in the Complaint, "[t]o hold otherwise would allow state legislatures and state administrative agencies to define what is and is not actionable discrimination under Title VI and would frustrate the purpose of Title VI." Compl. at 14; *see also id.* at 22–23 (discussing analysis in *Sandoval v. Hogan*, 197 F.3d 484, 508 (11th Cir. 1999),

rev'd on other grounds sub nom Alexander v. Sandoval, 532 U.S. 275 (2001)). Such a limitation has no basis in decisional law, no parallel in Title VI enforcement by other agencies, and no grounding in regulatory history.

III. IMPACTS FALL DISPROPORTIONATELY ON THE BASIS OF RACE.

The impacts of ADEM's decision to reissue Solid Waste Disposal Facility Permit No. 53-03 to Perry County Associates, LLC on September 27, 2011 and to modify Permit No. 53-03 on February 3, 2012 are disproportionate on the basis of race. As described in the Complaint filed for this investigation, the volumes and demographics demonstrate disproportionality. *See* Compl. at 7–9.

Significantly, the population around the Landfill is overwhelmingly African American. EPA's EJSCREEN tool data shows that residents of a two-mile radius around the active disposal area of Arrowhead Landfill is 98% African American, or the 96th percentile for minority population in the state and the 97th in the region and 96th in the United States. *See* EPA, EJSCREEN ACS Summary Report at 1 (data accessed Mar. 3, 2016) (Exhibit 7); EPA EJSCREEN Report at 3 (data accessed Mar. 3, 2016) (Exhibit 6). The community is also 83% low-income, in the 97th percentile of low-income populations in the state. EJSCREEN Report at 3 (Exhibit 6). This evidence and data demonstrate that there can be no dispute that these harms fall disproportionately on African Americans.

IV. THE DISPARATE IMPACT IS NOT JUSTIFIED: ADEM MUST COMPLY WITH TITLE VI EVEN WHERE, AS HERE, THE PERMIT REISSUANCE AND MODIFICATION DID NOT INVOLVE A SITING DECISION.

EPA's Title VI regulations prohibit actions, policies and practices by recipients—including permitting decisions—that result in unjustified disparate impacts. 40 C.F.R. § 7.30. As a recipient of funds from EPA, ADEM has a responsibility to ensure that its actions do not violate Title VI of the Civil Rights Act and EPA's regulations. ADEM's track record on environmental justice issues demonstrates that it does not believe this is part of its responsibility or, as it has claimed, that it is even within its authority to consider the effect of permits. *See* Letter from Lance R. LeFleur, Dir., ADEM, to Rafael DeLeon, Dir., EPA OCR (July 19, 2012) (filed in the instant proceeding) (disclaiming responsibility for Title VI compliance on the ground that permitting decision did not require reconsideration of Landfill location); EPA OCR, Investigative Report for Title VI Administrative Complaint File No. 28R-99-R4 at 12 (2003) (“ADEM states that its duty under Alabama law is solely to determine ‘the technical suitability of the site selected’ . . . [and] contends that all it can do ‘is deny a permit if the site is environmentally unsuitable for a landfill’ . . .”) (emphasis in original).

ADEM seems to take the position that it is discharged of responsibility to comply with Title VI in the permit renewal context since it is not revisiting the location of the facility. *See* LeFleur Letter *supra*. This position entirely misses the gravamen of the complaint: ADEM violated Title VI and its regulations by reissuing and modifying the Solid Waste Disposal Facility authorizing Perry County Associates to construct and operate the Arrowhead Landfill without adequate protections for the health and welfare of the community, with a disparate

impact on the basis of race. As discussed in the complaint, ADEM has ample authority to implement less discriminatory alternatives:

ADEM has express authority under the Alabama Administrative Code to regulate landfill practices that may cause odor and disease vectors. It also has express authority to establish buffer zones to protect against adverse aesthetic impacts (*e.g.*, noise, odor, and fugitive dust)....

Compl. at 14. Indeed, ADEM has broad statutory authority to place health and safety requirements on landfills through the promulgation of general regulations which are then incorporated into individual permits, *see* Ala. Code § 22-27-12(1) (2014) (granting ADEM the authority to adopt rules to implement the regulation of solid waste facilities); Ala. Code § 22-27-12(2) (2014) (granting ADEM authority to adopt rules to establish requirements and restrictions for the management of solid waste); Ala. Code § 22-27-12(3) (2014) (granting ADEM the power to issue permits and to “specify the terms and conditions of permits”), as well as through conditions placed upon individual permits at the agency’s discretion. *See, e.g.*, Ala. Admin. Code r. 335-13-4.11 (2014) (establishing that nothing in ADEM’s hydrogeology standards “shall prevent the Department from requiring an additional buffer as it may deem appropriate with respect to a particular site”, among other things.); *see also* Ala. Admin. Code r. 335-13-4.15 (2014) (“[d]aily, weekly, or some other periodic cover shall be required at all landfill units, as determined by the Department.”); Ala. Admin. Code r. 335-13-4.16(2)(b) (2014) (discretion regarding requirements to install permanent gas monitoring structures, gas vents, gas control or recovery systems); Ala. Admin. Code r. 335-13-4.22(3)(b) (2014) (“additional requirements for operating and maintaining a [municipal solid waste landfill] may be imposed by the Department, as deemed necessary to comply with the Act and this Division.”).

In sum, ADEM has discretionary authority in the permitting process to adopt a less discriminatory alternative.

V. THERE ARE LESS DISCRIMINATORY ALTERNATIVES.

Nothing short of shutting down the Landfill and moving the coal ash would alleviate all of the harms it causes. However, at the very least, ADEM should have and can require mitigation measures to minimize the harms from the Landfill. For example, there is not even a fence around the Landfill, allowing stray dogs to come and go, tracking coal ash and other waste from the Landfill. Likewise, ADEM must at the very least be required to test the groundwater and surface water in the area, following up on the findings of Ex. 6 Personal Privacy (PP). The drinking water must be evaluated as well. ADEM must also test the soil and dust, as well as the air, on nearby property. Until all these sensible tests have been completed, it is hard to construct the appropriate mitigations, but these would be first steps toward alleviating the disproportionate burden this community has borne for years. These are meant as illustrative; Complainants request an opportunity to discuss less discriminatory alternatives and potential mitigation measures with EPA in advance of any discussions regarding resolution of the complaint.

CONCLUSION

EPA must make a finding of discrimination based on the overwhelming evidence of discrimination, from ADEM's failure to conduct an analysis of whether its decision to reissue and modify the Landfill's permit would have an unjustified disparate impact to specific evidence of the adverse health and environmental impacts on Uniontown residents. The community around the Arrowhead Landfill is suffering numerous devastating health problems that did not exist before the Landfill arrived in town and began accepting coal ash. Complainants have provided ample information and evidence for EPA to make a finding of discrimination, as described in great detail above, in the Complaint, and in other submissions to EPA. If EPA finds any gaps in the evidence, it is its responsibility to conduct and complete an investigation closing these gaps. These permits allow the Landfill to operate across the street—literally feet away—from many homes, with runoff coming from the mountain of coal ash, as well as dust and fumes polluting the surrounding area and affecting residents' health. The evidence compels a finding of discrimination.

Sincerely,



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